

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GARY G. HAMPTON, JR.,

Plaintiff,

v.

LORI W. AUSTIN, et al.,

Defendants.

No. 2:20-cv-01001-KJM-DMC-P

ORDER

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by Eastern District of California local rules.

On August 17, 2022, the Magistrate Judge filed findings and recommendations, which were served on the parties and which contained notice that the parties may file objections within the time specified therein. The Magistrate Judge recommended dismissing plaintiff's action after the court warned plaintiff "that the failure to oppose the [pending] motion [to dismiss] could be construed as consent to the relief requested." F&R at 1, ECF No. 32. Plaintiff timely filed objections. *See* Obj., ECF No. 33.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 304, this court has conducted a *de novo* review of this case. Local Rule 230(c) states a "failure to file a timely opposition may be construed by the Court as a non-opposition to a motion" but does not

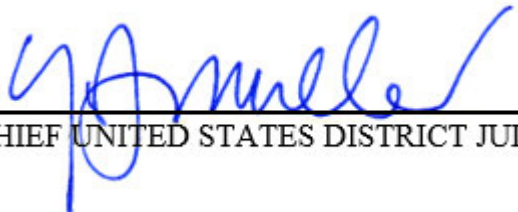
1 state a failure to respond may be construed as consent to the relief requested. E.D. Cal. L.R.
2 230(c). Courts may either dismiss complaints due to plaintiff's non-opposition or consider the
3 complaint's underlying merits regardless of the non-opposition. *Compare Ghazali v. Moran*,
4 46 F.3d 52, 54 (9th Cir. 1995) (dismissing case with prejudice due to plaintiff's non-opposition)
5 with *Elec. Recyclers Int'l, Inc. v. Calbag Metals Co.*, No. 1:14-CV-01352, 2015 WL 1529490, at
6 *2 (E.D. Cal. Apr. 2, 2015) ("Although Calbag's motion now faces no opposition, the court's
7 duty remains to consider its underlying merits.").

8 Here, this court has discretion to dismiss the case on a procedural basis due to plaintiff's
9 non-opposition. Plaintiff objects to dismissal, claiming for the first time that due to a learning
10 disability, counsel is needed "to adequately respond to these [sic] request to dismiss my
11 complaint." Obj. at 1. In light of plaintiff's objections, which raise new arguments not
12 previously considered by the magistrate judge, the court declines to adopt the findings and
13 recommendations. The matter is referred again to the magistrate judge for all further pretrial
14 proceedings, including consideration of whether petitioner qualifies for appointment of counsel.

15 Accordingly, IT IS HEREBY ORDERED that:

- 16 1. The court declines to adopt the magistrate judge's finding and recommendations; and
- 17 2. This matter is referred back to the assigned magistrate judge for all further pretrial
18 proceedings, including consideration of whether petition qualified for appointment of
19 counsel.

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21 DATED: February 21, 2023.

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24 CHIEF UNITED STATES DISTRICT JUDGE
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